U.S. Department of Labor

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Office of Administrative Law Judges
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San Francisco, CA 94105

In the Matter of:

MARIE VAN DYKE,
Claimant,

v.

MAERSK PACIFIC, LTD.,
Employer,

and

SIGNAL MUTUAL INSURANCE CO.,
Insurer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

June 13, 2000

CASE NO. 1999-LHC-2196
1999-LHC-2197

OWCP NO. 18-65319
18-67454

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Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER DENYING ADDITIONAL BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. §901 et seq. A trial on the merits of the claim was held in Long Beach, California, on January 26, 2000. The claimant, the employer, and the insurer were all represented by counsel and the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-23 and Employer's Exhibits (EX) 1-18. Subsequently,

the claimant submitted the transcript of a post-trial deposition of Dr. Randolph O'Hara, which is hereby admitted into evidence as Claimant's Exhibit 24. Both the claimant and the defendants filed post-trial briefs. Although the Director of the Office of Workers' Compensation Programs (OWCP) was given ample notice of the trial, the OWCP did not file a pre-trial statement, appear at the trial, or submit a post-trial brief.

BACKGROUND

The claimant was born on January 20, 1946 and received a nursing degree after attending two years of college. Tr. at 39. She began performing longshore work in 1985 or 1986 and eventually became a marine clerk. Tr. at 40-42. In approximately 1995 she began working exclusively as a gate clerk for Maersk Pacific (hereinafter "Maersk" or "the employer"). Tr. at 46-47, 61.

While the claimant was working as a gate clerk for Maersk on April 16, 1997, a rolling stool on which she was sitting fell over backwards. Tr. at 61-63, EX 12. When the stool hit the floor, the claimant landed on her left buttock. Tr. at 61. Despite feeling pain in her buttocks, she worked for the rest of the day. EX 14 at 244-245. However, early the next morning she began to develop intense pain in her lower back and felt stiffness in her shoulders and back. EX 14 at 245-246. A few days later the claimant decided to see a doctor, and after obtaining permission from the employer, sought treatment for lower back pain at Priority One in Long Beach. When she was examined there on April 21, Dr. John S. Burns diagnosed her condition as "[t]endonitis, contusion back with spasm" and prescribed a muscle relaxer and Motrin. Tr. at 64, CX 4. According to the claimant, after she was seen two or three times by Dr. Burns, he told her she could return to work. Tr. at 64-65. She, however, felt that her lower back pain precluded her from working and she therefore sought a second opinion from Dr. Randolph C. O'Hara, a board-certified orthopedic surgeon whose name she found by looking through a phone book. Tr. at 65, EX 14 at 251-252, CX 24.

On May 9, 1997, the claimant visited Dr. O'Hara for the first time. CX 5. She complained of constant back pain which was aggravated by bending, stooping, or lifting, and reported that she had difficulty standing for long periods. CX 5. The claimant described her job to Dr. O'Hara as one that did not require any lifting, but did involve a lot of bending and stooping as well as equal amounts of walking and sitting. CX 5. Dr. O'Hara's physical exam was essentially normal except for some tenderness and limited motion in the spine, which was "secondary to pain." He found no neurologic deficits. He reviewed five x-ray views of her spine and found them consistent with an isthmic spondylolisthesis at L5-S1. Dr. O'Hara also noted that the claimant denied any major medical illnesses or work-related back injuries, but had a previous work injury in 1986-87 which involved her neck. He then concluded that, "since the patient has had no prior history of reported lower back injuries, I feel that her above-noted symptoms are consistent with her reported injury." He further concluded that the claimant should remain on temporary total disability for one week, after which she could return to light duty. CX 5. Dr. O'Hara also prescribed a course of physical therapy. CX 6-11, 14-18, 20.

According to the claimant's testimony, in June of 1997 she asked Dr. O'Hara if she could return to work, and he agreed. Tr. at 66. However, she testified, after returning to work her back

"just got tighter and tighter," so after a month she decided to again seek treatment from Dr. O'Hara. Tr. at 67, EX 14 at 256. Dr. O'Hara then prescribed additional physical therapy and took her off work until early October. Tr. at 67-68, EX 14 at 256-57.

On August 15, 1997, the claimant was examined by Dr. James London, a board-certified orthopedic surgeon. In a report dated August 17, 1997, Dr. London noted that the claimant complained of constant pain on both sides of her lower back, lower back stiffness and tenderness, and occasional weakness in the backs of her thighs. EX 7. The results of his physical examination of the claimant were essentially normal. EX 7. Dr. London interpreted x-rays of the claimant's lumbar spine as showing narrowing of the L5-S1 disc space, bilateral spondylolisthesis at L5, anterior spurring at L1, and minimal right lumbar scoliosis. EX 7. Dr. London diagnosed the claimant's April 16 injury as being a lumbosacral strain and noted the presence of a longstanding, pre-existing spondylolisthesis and lumbar disc degeneration. He opined that she would be able to return to her usual work in two weeks and should in the meantime continue her physical therapy. EX 7. He anticipated that there would be no permanent impairment. EX 7.

In October of 1997 the claimant again returned to work as a gate clerk. Tr. at 68-69, EX 14 at 256-257.

As the claimant was finishing her shift on November 21, 1997, she tripped while walking through the doorway of her gate clerk's booth and landed on her knees. Tr. at 73, EX 1, EX 12, EX 14 at 263. Initially, she felt pain in her right knee, the back of her neck and her shoulders. Id. The following morning, she testified, the pain in her low back "started all over again." EX 14 at 265. Thereafter, she decided to again seek treatment from Dr. O'Hara, but encountered delays in getting authorization to make an appointment. EX 14 at 265-67, Tr. at 73-74, CX 13. In the interim, she continued to work as a gate clerk. Tr. at 74, EX 13 at 198-99.

After examining the claimant on December 2, Dr. O'Hara prepared a report indicating that the claimant had complaints of headaches and dizziness, stiffness in her back radiating down into her shoulder, nocturnal right arm pain, right knee aches, an inability to kneel, and sharp pain in both her feet. CX 13. The report also indicated that the claimant described her job as requiring her to lift 30-40 pounds unassisted and that Dr. O'Hara's physical examination revealed "obvious straightening" of the claimant's cervical lordosis, bilateral paraspinous spasms, and a cervical range of motion that was "severely limited" due to pain. CX 13. Dr. O'Hara had x-rays taken of the claimant's cervical spine and interpreted them as showing a "kyphotic configuration" with a marked degenerative disc disease at C5-6 and C6-7 but no acute fracture or osseus lesion. He recommended continued physical therapy and anti-inflammatories. Dr. O'Hara also opined that 60 percent of the claimant's symptoms were related to her most recent injury, and that the remaining 40 percent were attributable to pre-existing degeneration and a 1987 auto accident. CX 13 at 25-26. He also concluded that the claimant would be "temporarily permanently disabled" for approximately two to six weeks.

Although the claimant testified that she cannot recall if she continued to work after the December 2 visit to Dr. O'Hara, payroll records show that the claimant did in fact return to work on December 3 and that she continued working for the remainder of that week, during all of the

following week, and on the first three days of the week of December 15. EX 14 at 271-72 (claimant's deposition testimony) EX 13 at 199, CX 23 at 75 (payroll records). On December 17, the claimant was again examined by Dr. O'Hara, who then filled out a State of California form indicating that in his opinion the claimant should remain off work and continue treatment. CX 11 at 16-17. The form also indicated that Dr. O'Hara believed that the claimant would be able return to work in about one month. Id. On the same day that Dr. O'Hara completed this form, the claimant's husband, who was also employed as a steady gate clerk for Maersk, ceased working as a longshoreman. Tr. at 143, 286. According to his testimony, he stopped working because of problems with his knee joints, both of which had been surgically replaced in 1994. Tr. at 282-89.

At some unspecified time during the end of December 1997, both the claimant and her husband moved from the Long Beach area to Kernville, California, a town where they already owned a dwelling that they had been remodeling since at least 1997. Tr. at 146, 281 (testimony concerning move to Kernville), Tr. at 104-08 (testimony concerning renovations). According to the claimant, she believes the move occurred at the end of December because the condo she and her husband were renting was being sold and the closing on the property was at the end of December. Tr. at 146. After moving to Kernville, which is a three and one-half hour drive from Long Beach, the claimant made no attempt to return to work. Tr. at 147, 134. However, the claimant asserts that when she moved to Kernville she didn't know what was going to happen in the future and thought it was possible that she and her husband might return to the Long Beach area. Tr. at 147. When asked if she and her husband decided to retire in December of 1997, she answered that she didn't recall. Tr. at 147.

On February 19, 1998, the claimant was examined by Dr. O'Hara, who prepared a report entitled "Orthopaedic Permanent and Stationary Evaluation." CX 12. According to the report, the claimant had complaints of "intermittent lower back pain," "mechanical pain" at the extremes of forward flexion and extension, neck pain, and pain in both shoulders. During his physical examination of the claimant's cervical spine, Dr. O'Hara found straightening of the lordosis, tenderness, and a significantly limited range of motion "secondary to pain." CX 12. He also found "minimal tenderness" in the claimant's thoracolumbar spine with no paraspinous tenderness. Dr. O'Hara assessed the claimant's condition as spondylolisthesis L5-S1, "status post lumbosacral strain," and "acute cervical myofascial strain." CX 12 at 19. He recommended continued physical therapy for the cervical condition, but concluded that the claimant's lower back condition was permanent and stationary. He also added that if there were any flare ups of her lower back condition, she might benefit from physical therapy six to eight times per year. He then opined that the back injury had caused a ten percent diminution in lifting capacity which precluded her from "any heavy labor lifting activities." CX 12 at 20. He further opined that she could lift up to 40 pounds on an infrequent basis, but should avoid any repetitive or continuous bending, stooping, lifting, or squatting. He also added that the claimant had no limitations on standing, sitting, or walking. In combination, he concluded, these restrictions amounted to a ten percent disability. CX 12 at 20.

On April 8, 1998, the claimant was again examined by Dr. London. EX 7. In a report dated April 13, 1998, Dr. London described the claimant's subjective symptoms as including pain on both sides of her neck that radiated into her shoulders and spine, constant stiffness in her neck, grinding in her neck with motion, and neck tightness associated with occipital headaches. EX 7. In

summarizing the results of the claimant's physical examination, Dr. London indicated that there was tenderness in the right paraspinal muscles but no paraspinal muscle spasms and a normal cervical lordosis. Five x-rays of the claimant's cervical spine were taken and interpreted by Dr. London as showing a reversal of the normal cervical lordosis, marked narrowing at C5-6 and C6-7, and spurs at C5-6 that were involved with right foraminal encroachment at C5-6. EX 7. Dr. London diagnosed the claimant's November 21 injury as consisting of contusions to the anterior of both knees and a cervical strain. He also noted that the claimant had a pre-existing, long-standing cervical disease at C5-6 and C6-7. EX 7at 128. Dr. London concluded that the claimant needed further medical treatment and recommended that she undergo a cervical MRI. He also recommended that she remain on total temporary disability for three weeks and continue receiving physical therapy. EX 7 at 128.

The cervical MRI requested by Dr. London was performed on April 15, 1998. The radiologist's report indicated that it showed some degenerative change with small spondylitic ridges at C6-7, some mild annular bulges at C4-5 and C5-6, a "slight loss" of normal cervical curvature and "considerable articular disease" on the right at C2-3 and bilaterally at C3-4. EX 9.

On April 24, 1998, Dr. London again saw the claimant. In a May 6, 1998 report concerning that visit, Dr. London noted that there had been no change in the claimant's symptoms since her last visit and that she was continuing to receive physical therapy at Kern County Hospital. EX 7 at 130. He also noted that the MRI failed to show any evidence of spinal canal stenosis or impingement on the spinal cord or nerve roots. Id. Dr. London also repeated his prior conclusion that the claimant's November 21 injury consisted of knee contusions and a cervical strain. EX 7 at 131. He further concluded that the claimant had improved with physical therapy and should remain off work for three more weeks in order to complete that therapy. He also commented that no permanent disability was anticipated. EX 7 at 131. On the same day this report was prepared, Dr. London viewed a sub rosa video tape showing the claimant as she was walking. EX 7 at 129. He commented that the claimant was shown walking normally and turning her neck without any restriction or pain avoidance behavior. He then opined that the claimant would be able to return to her regular work three weeks after his April 24, 1998 exam. EX 7 at 129.

On May 26, 1998, the claimant was again seen by Dr. O'Hara. In his report, Dr. O'Hara noted that there was a "marked" loss of range of motion in the claimant's cervical spine and that the claimant had told him that there had been little improvement in her neck pain. CX 21 at 35-37. He also noted that although the claimant did not have any radicular symptoms, she had occasional posterior headaches and was "unable to tolerate her activities of daily living at this time secondary to pain." CX 21 at 35. Dr. O'Hara described his assessment of the claimant's condition as being an "exacerbation" of degenerative disc disease of the cervical spine. Id. He noted that physical therapy had not improved the claimant's condition and therefore concluded that her condition had become permanent and stationary. He further concluded that the claimant was unable to return to her usual and customary work activities "at this time secondary to her chronic neck pain" and recommended that she be given vocational rehabilitation CX 21 at 36. In concluding his report, Dr. O'Hara opined that the claimant is permanently precluded from performing "any repetitive or continuous overhead activities" and from lifting or carrying "more than 20 pounds on an infrequent

basis," but could perform overhead activities on "an infrequent basis" and had no limitations on using her hands for "fine motor" or repetitive activities. CX 21 at 36.

In approximately June of 1998, the claimant's husband began receiving disability retirement payments of $1208 per month from his union's disability insurance plan. Tr. at 282-283. During that same month the claimant underwent her last physical therapy session. Tr. at 137-140. Since then she has not received any medical treatment for her neck or back. Id.

On July 2, 1998, the claimant filed two claims for compensation with the OWCP. EX 2, CX 3. The first claim sought benefits for injuries to her wrist, back and neck that occurred on April 16, 1997. The second claim sought benefits for injuries to her knees, back and neck during the November 21, 1997 accident. On July 9, 1998, the employer filed a notice of controversion controverting benefits for all the claimant's injuries. [1]

On August 3, 1998, the claimant underwent a third examination by Dr. London. EX 7 at 132-37. According to Dr. London's August 11 report, during the examination the claimant told him that she had been continuing to suffer various neck symptoms and that new symptoms such as arm tingling, trembling and weakness had developed. EX 7 at 132-33. Dr. London's examination of the claimant's neck showed "cogwheeling with range of motion testing" and no evidence of muscle spasms. During his examination of the claimant's upper extremities, Dr. London observed trembling in the claimant's hands when her arms were extended in front of her but no trembling when "at rest" and no evidence of muscle atrophy. EX 7 at 135. The results of the examination of the claimant's lower extremities were essentially normal. EX 7 at 136. After setting forth the examination findings and a summary of the claimant's prior treatment, Dr. London opined that the claimant's condition was permanent and stationary and concluded that she had recovered from her injury. He further concluded that the claimant was capable of returning to her usual work without restricitons. EX 7 at 136. In explaining these conclusions, he noted that the MRI of the claimant's cervical spine had shown disc degeneration at C5-6 and C6-7 but contained no evidence of any acute changes. He also noted that the disc degeneration shown on the MRI was a chronic degenerative condition that existed prior to the November 21, 1997 accident. EX 7 at 136. In addition, he observed that he was unable to find any objective orthopedic pathologic findings that would explain the claimant's subjective symptoms and noted that "a number of findings" during the claimant's physical examination could not be explained "on any objective orthopedic basis." Id. Among these findings, he noted, were "give way" weakness in the claimant's upper arms, "diffuse migratory tenderness" over the back of her neck and shoulders, and "cogwheeling" during range of motion tests. EX 7 at 136-137.

[1] The employer paid benefits to the claimant for the April 16, 1997 injury from April 17, 1997 to May 16, 1997, from May 19, 1997 to June 8, 1997, and from July 30, 1997 to October 1,1997 at a compensation rate of $801.06 per week. EX 5 at 17. Benefits for the November 21, 1997 injury were paid from December 17, 1998 to May 14, 1998 at the rate of $835.74 per week. EX 5 at 18.

At some unspecified date during the beginning or middle of 1998, the claimant applied for a disability retirement from her union. Tr. at 140, EX 14 at 222. Payment of such benefits totaling $936 per month commenced in October of 1998. Tr. at 134, 140.

On December 1, 1998, the claimant was examined by Dr. Scott Haldeman, a board-certified neurologist. During the examination, the claimant complained of headaches and pains in her neck, central back at shoulder level, lower back, and left leg. EX 8. She described her gate clerk work as requiring her to be on her feet for as long as six hours in a day and indicated that she sometimes had to lift 30 to 40 pound boxes of paper for a printer. During the physical examination the claimant reported pain with all movements of her cervical spine and Dr. Haldeman noted that she displayed slow movement and an unusual gait when walking. EX 8 at 147-50. Dr. Haldeman described the claimant's gait as being "slightly theatrical" but found her complaints to be "consistent with" strains superimposed on chronic degenerative changes in her cervical, thoracic and lumbar spines. EX 8 at 151. He also opined that his review of the claimant's medical records indicated that all her injuries were permanent and stationary when she was seen by Dr. O'Hara on February 19, 1998. EX 8 at 152. Dr. Haldeman further opined that although 50 percent of the claimant's neck and back symptoms were attributable to the claimant's pre-existing degenerative conditions, the remaining 50 percent of the symptoms could be attributed to her work injuries. EX 8 at 154. He also concluded that Dr. O'Hara's work restrictions of February 19, 1998 were reasonable and concurred with Dr. O'Hara's conclusion that the claimant needed no restrictions on sitting, walking, or standing. EX 8 at 153. However, Dr. Haldeman asserted that because Dr. O'Hara's evaluations on February 19 and May 26, 1998 were essentially identical there was no basis for Dr. O'Hara's decision to increase her disability restrictions after the May 26 exam. EX 8 at 152. In addition, Dr. Haldeman asserted that Dr. O'Hara's May 26 work restrictions were unwarranted and contended that the claimant did not have any work restrictions that would preclude her from performing the gate clerk job duties described to him by the claimant. EX 8 at 153.

In December of 1998 or January of 1999 the claimant and her husband traveled to Idaho where they found and purchased a house. Tr. at 144-146. In June of 1999 the claimant and her husband moved to Idaho. Tr. at 138.

On October 27, 1999, Malcom Howard, a vocational counselor employed by Resource Opportunities, Inc., prepared a detailed analysis of the claimant's former job as a gate clerk. Tr. at 232-233, EX 15. In preparing the analysis, Mr. Howard visited the Maersk facility where the claimant had worked and interviewed Mark Blackmun, Maresk's director of safety and dispatch. Tr. at 232-233. According to the resulting job analysis, gate clerks at Maersk engage in overhead reaching to attach seals to containers approximately 65 times an hour, but are not required to lift or carry more than 10 pounds, or to engage in any pushing, pulling, bending, stooping or climbing. EX 15. On January 11, 2000, Dr. London reviewed the job analysis and issued a letter in which he opined that gate clerk duties described in the report are within the claimant's physical capabilities. EX 7 at 137a. Likewise, on January 21, 2000, Dr. Haldeman prepared a letter in which opined that the duties described in the job analysis are within the claimant's restrictions. He also stated that the job analysis was in conflict with the claimant's statement to him that her job occasionally required her to lift 30-40 pound boxes. EX 8 at 155a.

ANALYSIS

The parties have stipulated: (1) that on April 16, 1997 the claimant suffered an injury to her lumbarsacral spine, (2) that on November 21, 1997, the claimant suffered an injury to her knees and cervical spine, (3) that both injuries occurred at a maritime situs and while the claimant was working in a maritime status, (4) that the weekly compensation rate for the first injury was $801.06 and that the compensation rate for the second injury was $835.74, and (5) that the period of temporary total disability benefits for the first injury ended on October 1, 1997, (6) that the entitlement to disability benefits for the second injury commenced on December 18, 1997, and (7) that the second injury became permanent and stationary on May 26, 1998. All of these stipulations, including the stipulation concerning situs and status, have been found to be fully supported by the evidence and are hereby adopted as findings of fact. The following issues are in dispute: (1) the date of maximum medical improvement for the first injury, (2) the permanency of any disability arising out of the foregoing injuries, (3) the extent of the claimant's disability, and (4) the employer's entitlement to Special Fund Relief.

1. Date of Maximum Medical Improvement for the First Injury

The claimant contends that her first injury became permanent and stationary on February 19, 1998. The employer, on the other hand, contends that the claimant's first injury reached the point of maximum medical improvement on October 2, 1997.

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (1st Cir. 1979); Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984); Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. Williams v. General Dynamics Corp., 10 BRBS 915 (1979); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988); Dixon v. John J. McMullen and Associates, Inc., 19 BRBS 243 (1986); Trask v. Lockheed Shipbuilding and Construction Co., 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. Abbott v. Louisiana Insurance Guaranty Ass'n, 27 BRBS 192, 200 (1993), aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott, 40 F.3d 122, 126 (5th Cir. 1994).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." Amos v. Director, OWCP, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). However,

the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." Id. In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" Id.

In this case, the claimant's contention that her first injury did not become permanent and stationary until February 19, 1998 is based on a report prepared on that date by the claimant's treating physician, Dr. O'Hara. As previously noted, in that report Dr. O'Hara opined that the claimant's first injury had resulted in a ten percent diminution in her lifting capacity and had become permanent and stationary. CX 12 at 18-20 In contrast, the employer's contention that maximum medical improvement occurred on October 2, 1997 is based on an August 17, 1997 report in which Dr. London anticipated that the claimant's injury would become permanent and stationary in two to six weeks. EX 7. Because the date of maximum medical improvement suggested by Dr. London was based on an estimate of future events rather than a contemporaneous physical examination, it is less convincing that the date advocated by Dr. O'Hara, who personally examined the claimant on at least three occasions between late August of 1997 and February of 1998. CX 9, CX 10, CX 11. Accordingly, I find that the claimant's first injury did not reach the point of maximum medical improvement until February 19, 1998.

2. Permanency of Any Disability Arising from Either Injury

The claimant contends that her two injuries have resulted in permanent aggravations of her pre-existing degenerative back and neck impairments. In contrast, the employer concedes that the claimant's lower back and neck were temporarily aggravated by her two work-related injuries, but contends that neither of the claimant's work-related injuries caused any permanent disability. The employer thus contends that neither injury precludes the claimant from returning to work as a gate clerk.

It is well established that the subsection 20(a) presumption of causation does not apply when considering the nature and extent of a claimant's injury and that therefore the burden of establishing the permanency of any work-related impairment is on the claimant. See Holton v. Independent Stevedoring, 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp., 12 BRBS 112 (1979).

A. Evidence the Pre-Existing Impairments Were Permanently Worsened

The claimant's argument that her pre-existing back and neck impairments were permanently worsened by her work injuries is supported by her own testimony, by the testimony of both Dr. O'Hara and her husband, and by the December 1998 report of Dr. Haldeman. A summary of this evidence is set forth below.

Claimant's Testimony. According to the claimant, before her two work injuries it was very rare for her to suffer neck or back pain and such conditions precluded her from working no more than once or twice a year. Tr. at 53, 149. In contrast, she testified, since the occurrence of her two work injuries her overall condition has dramatically worsened and she has begun to experience shooting pains in her left leg, constant neck pain, pain in both hands, and severe headaches. Tr. at 80-82. In fact, she testified, she has to lay down an average of three times a day because of neck or back pain. Tr. at 89-90.

Testimony of the Claimant's Husband. According to the testimony of the claimant's husband, Jan Van Dyke, the change in the claimant's condition since her work injuries is like the difference between "night and day." Tr. at 274-75. He also testified that "quite often" he observes the claimant in "obvious pain" and estimated that the pain is "pretty intense" at least four or five days a week. Tr. at 275-76.

Testimony and Reports of Dr. O'Hara. According to Dr. O'Hara's testimony, x-rays show that prior to the claimant's April 1997 injury she had a lower back condition known as spondylolisthesis which can be permanently aggravated by injuries such as the one the claimant suffered when her stool fell over. CX 24 at 13-14, 53. As well, he testified, he believes the April 1997 injury did in fact cause a permanent worsening of the claimant's low back condition. CX 24 at 54-55. Likewise, he believes that approximately 60 to 80 percent of the claimant's neck symptoms can be attributed to her November 1997 injury. CX 24 at 67, 80.

Report of Dr. Haldeman. As previously explained, Dr. Haldeman opined in his report of December 1, 1998 that although the claimant did have pre-existing degenerative back and neck conditions, approximately 50 percent of her post injury symptoms should be attributed to her work injuries. EX 8 at 154.

B. Evidence the 1997 Injuries Did Not Permanently Worsen the Pre-Existing Impairment

The employer's contention that the claimant does not have a permanent work-related back or neck impairment is primarily based on the medical reports and testimony of Dr. London. According to Dr. London, the claimant's pre-existing neck and back conditions were exacerbated by soft tissue strains that occurred during her two work injuries but these exacerbations were only temporary and any symptoms that the claimant may now be suffering are solely due to the developmental and degenerative conditions that existed prior to her injuries. Tr. at 167-79, 179, 186-87. In explaining this opinion, Dr. London noted that the claimant's x-rays and MRI fail to show any evidence of any acute injuries. Tr. at 176-79. In addition, he pointed out, recovery from sprains usually occurs within four months, even when superimposed on degenerative conditions such as the claimant's. Tr. at 182-83, 187. He also asserted that the claimant did not notice any pain in her neck until two or three days after the second injury and contended that such a delay in the onset of symptoms suggests that the sprain was less serious than sprains that produce immediate symptoms. Tr. at 184-85. Dr. London also contended that the fact that the claimant continued working for almost a month after the second injury suggests that the sprain that occurred during that injury was not severe. Tr. at 187-88.

C. Evaluation of the Evidence of Permanent Worsening

As indicated, Dr. London is the only witness who has suggested that the claimant's injuries did not result in a permanent impairment while the claimant, her husband, Dr. O'Hara, and Dr. Haldeman have all offered evidence indicating that the claimant's injuries did in fact cause some permanent worsening of her pre-existing degenerative conditions. It is also noted in this regard that Dr. London was incorrect insofar as he asserted that the claimant did not notice any neck problems until two or three days after her November 21, 1997 injury. In fact, the accident report submitted on the day of the injury indicates that the claimant was at that time experiencing pain in the back of her neck. EX 1 at 2. Accordingly, I conclude that the claimant's injuries did cause at least some permanent increase in her back and neck impairments.

3. Extent of Disability

The claimant contends that she was temporarily totally disabled until May 25, 1998 and has been permanently totally disabled since May 26, 1998. The employer contends that any temporary total disability ended on May 14, 1998 and that, because the claimant is not precluded from working as a gate clerk, she is not entitled to any permanent disability benefits.

Under the Longshore Act, any claimant seeking disability benefits has the burden of proving a prima facie case of disability by showing that he or she cannot return to his or her regular employment due to a work-related injury. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980); Trask v. Lockheed Shipbuilding Co., 17 BRBS 56, 59 (1980). If the claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. See, e.g., Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327 (9th Cir. 1980); Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988). In this case, the dispute concerning the extent of the claimant's disability has two aspects: the exact nature of the duties of a gate clerk and whether the claimant is capable of performing those duties.

(1) Duties of a Gate Clerk

The parties apparently agree that the claimant's job as a gate clerk did require her to frequently change positions and to intermittently walk outside her booth to check empty containers or make observations concerning refrigerated containers and vehicles containing hazardous cargo. However, they have disagreements concerning several other alleged aspects of the gate clerk job being performed by the claimant at the time of her injuries. In particular, the claimant contends that as a gate clerk she was required to carry printer paper weighing as much as 30 pounds at least once a day and was also required to reach overhead approximately 150 times a day to check or install seals on the containers passing through her gate. Tr. at 46-52. In fact, the claimant testified, she had to leave her booth every time a truck came by and either check the seal on each loaded container or install a new seal. Tr. at 123. This testimony was partially corroborated by the claimant's husband who testified that in his experience as a gate clerk for Maersk, in-gate clerks like the claimant would

have to install seals on as many as 120 or 130 containers during a single shift. Tr. at 271. In addition, as previously noted, the job analysis prepared by Mr. Howard also indicates that gate clerks reach above shoulder level to install seals.

This accuracy of the foregoing evidence is directly disputed by other evidence submitted by the employer. For example, Mr. Howard testified that although his written job analysis of gate clerk duties indicates that gate clerks reach above shoulder level approximately 65 times an hour in order to attach seals to containers, his inquiries also indicated that such reaching is "optional" and that "99 percent of the time" the seals are actually attached by the truck drivers. Tr. at 239 (testimony), EX 15 at 321-22 (job analysis). In addition, the employer points out that the claimant's trial testimony concerning the number of times she had to leave her booth was inconsistent with pre-trial deposition testimony in which she described her duties as follows:

> It's an up-and-down thing, but if I have a whole bunch of loads coming in, usually unless there is hazardous [cargo], I'd just be feeding them without coming down off the booth, but if it was an empty, and sometimes, you know, we take more empties than we took loads. That's when the coming in and out would happen.

EX 14 at 233. It is also noted that although during cross examination the claimant denied giving seals to truck drivers to install, during her direct examination she testified that she would sometimes have the drivers install the seals. Tr. at 125-26 (testimony denying that she would have the truck drivers install the seals), Tr. at 50 (testimony that she would have the truck drivers install seals when the installation sites were beyond her reach). In addition, during cross examination, the claimant admitted that carrying boxes of printer paper was not a responsibility assigned to gate clerks and that in fact the duty was assigned to superintendents. Tr. at 127-28.

After weighing this evidence, I conclude that the claimant has failed to show by a preponderance of the evidence that she was required to lift 30-pound boxes of printer paper or to repetitively install seals on loaded containers.

(2) Claimant's Ability to Continue Working as a Gate Clerk

According to the claimant, even if the gate clerk job does not require lifting or frequent installation of container seals, she is still incapable of performing the job. In particular, she testified that she cannot perform her former job because she is no longer capable of doing the following job duties on a repetitive basis: walking in and out of the gate booth, standing up, sitting down, and "climbing" onto the gate clerk's stool. Tr. at 92-94, 151-53. These conclusions are not shared by any of the physicians who have provided opinions concerning the extent of the claimant's permanent limitations. For example, Dr. O'Hara's post-trial testimony indicates that, in his opinion, the claimant cannot engage in repetitive overhead activities, pushing, pulling, or lifting or carrying 30-to-40 pound weights, but can do a job that requires her to alternatively sit, stand and walk. CX 24 at 68, 84, 87. According to Dr. London, the claimant's physical restrictions are not even as extensive as those proposed by Dr. O'Hara and the claimant is in fact capable of performing all the gate clerk duties described in the job analysis prepared by Mr. Howard. EX 7 at 137a (January 11, 2000 report), Tr.

at 179-80, (testimony of Dr. London indicating that in his opinion the claimant is capable of performing the duties of a gate clerk). Likewise, Dr. Haldeman has indicated that although he agrees with the work restrictions in Dr. O'Hara's February 1998 report, he disagrees with the additional restrictions imposed by Dr. O'Hara in May of 1998 and believes the claimant is in fact capable of performing the duties of a gate clerk. EX 8 at 153(report of Dr. Haldeman indicating that the claimant is capable of working as a gate clerk).

After considering all of the relevant evidence, I find that, on balance, the claimant has failed to show by a preponderance of the evidence that she is incapable of performing her former job as a gate clerk.[2] There are five considerations, which have, in combination, led to this conclusion.

First, as pointed out by Dr. London, there is an absence of any objective evidence that the claimant's two work injuries caused any permanent worsening of her pre-existing back and neck conditions. Hence, any finding that the claimant is permanently precluded from returning to work as a gate clerk must be based primarily on the assertions of the claimant and her husband that her subjective symptoms have materially worsened since those injuries occurred.

Second, there is strong circumstantial evidence indicating that the claimant might well have ceased working as a gate clerk by the end of December of 1997 even if she had not been injured on November 21, 1997. This conclusion is supported by the fact that some time before the claimant's last day of work as a gate clerk (December 17, 1997) her husband had made a decision to retire from his job and by the fact that the claimant and her husband had also apparently contemporaneously decided to move to Kernville rather than find a new place to live after the termination of the lease on the rental condominium in which they had been living. It is also noteworthy that the move to Kernville occurred before the claimant's injury had reached maximum medical improvement and at a time when Dr. O'Hara was predicting that the claimant would be able to return to work in less than a month. CX 11 at 16. Moreover, the evidence shows that even though Dr. O'Hara admits that it would have been "reasonable" for the claimant to have attempted to have returned to work on a trial basis after May of 1998, she never made any such effort to see if she could still perform her former job. Tr. at 133 (testimony of the claimant), CX 24 at 76 (Dr. O'Hara's testimony that it would have been reasonable for the claimant to have made a trial attempt to return to work).

Third, although the claimant's husband has corroborated her description of her limitations, there is credible evidence indicating that the claimant may be exaggerating the extent of her disability. For example, the limitations described by the claimant are substantially greater than even those adopted by her treating physician, Dr. O'Hara. Moreover, Dr. London indicated that various behaviors displayed by the claimant during his August 3, 1998 examination (e.g., "cogwheeling during

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[2]Although the claimant has not explicitly asked for an award of *de minimis* benefits, I have nonetheless considered the possibility that she might be entitled to such an award. However, after considering the relevant evidence I have determined that the evidence is insufficient to warrant a conclusion that there is a significant possibility of a future loss of wage earning capacity. I therefore find that the claimant is not entitled to an award of *de minimis* benefits.

range of motion testing and exhibiting "give way" weakness when tested for upper arm strength) cannot be explained "on any objective orthopedic basis." Likewise, although Dr. Haldeman believed that the claimant did have some limitations, he described parts of her clinical presentation as being "theatrical." It is also noted that although the claimant contends that she suffers nearly constant pain and has to spend large parts of the day lying down, she has not sought any medical treatment for her condition since the middle of 1998 and uses only over-the-counter medications like Tylenol and Advil. Tr. at 89-90, 137-39.

Fourth, payroll records show that the claimant continued to work for almost four weeks following her second injury, thereby suggesting that neither the first nor the second injury was disabling enough to keep the claimant from performing her regular duties in the period immediately following the second injury. It is also noted that the claimant's professed inability to recall whether she worked after the second injury circumstantially indicates that the work that she performed during that four-week period was not exceptionally onerous for her.

Fifth, although Dr. O'Hara was the treating physician and has testified that in his opinion the claimant cannot return to work as a gate clerk, it is clear from his testimony that this opinion is based on an assumption that the job requires repetitive overhead activities, pushing, pulling, and the lifting or carrying of 30 to 40 pounds. CX 24 at 68-69. As previously determined, these assumptions are inaccurate. Indeed, Dr. O'Hara admitted that the claimant could do the work of a gate clerk if not required to engage in such activities. CX 24 at 84, 87.

Finally, it is noted that there is also a disagreement between the parties concerning the length of the claimant's period of total temporary disability. In particular, the claimant contends that she was totally temporarily disabled until May 26, 1998, but the employer asserts that the period of total temporary disability ended on May 14, 1998. The claimant's contention is based on Dr. O'Hara's report of May 26, 1998, while the employer's position is supported by the May 6, 1998 report of Dr. London and by Dr. Haldeman's report of December 1, 1998. In this regard, I note that although Dr. O'Hara's May 26, 1998 report does opine that the claimant was at that time permanently precluded from returning to work as a gate clerk, that opinion was based on an inaccurate understanding of the claimant's job duties. In addition, Dr. O'Hara did not specifically rule out the possibility that, if the claimant's job were lighter than he had mistakenly assumed, the claimant could have returned to work before her condition became permanent and stationary, as she did following her first injury. In contrast, Dr. London's May 6, 1998 report is based on a more accurate understanding of the claimant's job duties and specifically concluded that the claimant could return to work within three weeks following April 24, 1998. EX 7 at 129. Accordingly, I conclude that the claimant's period of total temporary disability ended on May 14, 1998.

ORDER

1. The claimant's request for additional disability benefits is hereby denied.

2. The employer shall provide such future medical care as may be reasonable and necessary for the treatment of the claimant's injuries of April 16 and November 21, 1997.

_____
Paul A. Mapes
Administrative Law Judge

Date_____

[I further find that even if the gate clerk's job did require the claimant to check container seals/lift printer paper, etc. she still would have been able to perform the job. In this regard, it is noted that _____ and _____ [within O'Hara/Haldeman restrictions]

It is also noted that the claimant's assertions concerning the extent of her disability are also partially corroborated by the fact that his failure to return to work since December of 1997 has resulted in a decline in her income that has only partly been offset by the $ _____ disability benefits she receives each month from her union-sponsored disability coverage.

4. Special Fund Relief

The employer seeks Special Fund relief from any award of permanent disability benefits. The Director has failed to submit any evidence or arguments concerning this request. In order to obtain relief from the Special Fund under subsection 8(f) of the Act the employer must show: (1) that the claimant had a permanent partial disability prior to his 1997 work-related injury, (2) that the pre-existing disability was manifest prior to that injury, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. See Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982).

Existence of a Pre-Existing Permanent Disability. As previously noted, the first of the three requirements for obtaining subsection 8(f) relief is a showing by the employer that prior to the claimant's work-related injury the claimant had a pre-existing permanent partial disability. Such a pre-existing disability, however, need not be economically disabling or require medical treatment in order to constitute a permanent partial disability within the meaning of subsection 8(f). Rather, it is sufficient to show that, "because of a greatly increased risk of employment related accident and compensation liability," the pre-existing condition would motivate a cautious employer to discharge or refrain from hiring the employee. See C&P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977); Director, OWCP v. Campbell Industries, Inc., supra. See also Todd Pacific Shipyards v. Director, OWCP, 913 F.2d 1426 (9th Cir. 1990); Currie v. Cooper Stevedoring Co., 23 BRBS 420, 426 (1990). In this case, the evidence shows that prior to the claimant's 1997 work injuries, [various medical specialists had determined that he had work restrictions that were both permanent and substantial. It appears to be more likely than not that a cautious employer would be

motivated to discharge a person with such a condition due to a fear of potential workers' compensation liability. Accordingly, I find that the first prerequisite for subsection 8(f) relief has been met.]

Evidence Disability Was Manifest. The second pre-condition for subsection 8(f) relief is a showing that the claimant's pre-existing disability was "manifest" to the employer prior to the subsequent injury. See Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983). This requirement can be met by showing either that the employer had actual knowledge of the condition or that there were medical records in existence prior to the subsequent injury from which the claimant's condition was objectively determinable. Todd v. Todd Shipyards Corporation, 16 BRBS 163 (1984). Moreover, the medical records need not indicate the precise nature of the pre-existing condition, including its permanency, so long as they contain information regarding the existence of a serious lasting problem that would motivate a cautious employer to consider terminating the employee because of the risk of future compensation liability. Lockhart v. General Dynamics Corp., 20 BRBS 219, 225 (1988), aff'd sub. nom Director, OWCP v. General Dynamics, 980 F.2d 74 (1st Cir. 1992). In addition, the records do not have to show that the condition was symptomatic or that the condition would actually impair a person's ability to work. Director, OWCP v. Berkstresser, 921 F.2d 306, 310 (D.C. Cir. 1991). [As previously mentioned, the record in this case indicates that prior to the claimant's 1997 injury there were already in existence numerous medical records confirming that the claimant has a serious and permanent medical condition that interfered with his ability to work. Hence, the second requirement for subsection 8(f) relief has also been met.]

Contribution to the Ultimate Permanent Disability. The third requirement for obtaining subsection 8(f) relief is proof that the pre-existing disability contributed to the claimant's ultimate permanent disability in the manner prescribed in the Act. There are two aspects of this requirement. First, the employer must establish that the ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. 20 C.F.R. §702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. FMC Corp. v. Director, OWCP, 886 F.2d 1185 (9th Cir. 1989); Director, OWCP v. Luccitelli, 964 F.2d 1303 (2nd Cir. 1992); Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 8 F.3d 175, 185 (4th Cir. 1993). In this case,[it is clear from the totality of the medical evidence that the claimant's current disability is not due solely to his 1997 injury. As well, it is also clear from the reports of Dr. Delman that the claimant's pre-existing disability caused his 1997 injury to result in a materially and substantially greater disability. EX 6 at 82. Accordingly, I conclude that the evidence is sufficient to show that all three of the subsection 8(f) contribution requirements have been fully satisfied.]

ORDER

1. The employer shall pay the claimant compensation for temporary total disability for the period between xxxxxxxxxxx, 1997 and xxxxxxxxx, 1998, at a compensation rate of $_____ and from xxxxxxxxxx, 1997 and xxxxxxxx, 1998, inclusive, at a compensation rate of $835.74 per week.

2. Beginning on September 29, 1998 and for the following 104 weeks, the employer shall pay the claimant permanent partial disability benefits at a compensation rate of $833.74 per week.

3. Beginning 104 weeks from September 29, 1998 and until ordered otherwise, the Special Fund shall pay the claimant permanent partial disability benefits at a compensation rate of $833.74 per week.

4. The employer shall receive credit for all benefits paid to the claimant since xxxxxxxxxxxxx, 1997.

5. The employer shall provide such future medical care as may be reasonable and necessary for the treatment of the claimant's injuries of xxxxxxxxxxx and xxxxxxxxxxxxxx, 1997.

6. The employer shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §1961.

7. The District Director shall make all calculations necessary to carry out this order.

8. Within 30 days after this Decision and Order becomes final, counsel for the claimant shall submit a fully supported application for costs and fees to the undersigned administrative law judge and to counsel for the employer. Within 15 days thereafter, counsel for the employer shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with counsel for the employer. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of her position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for the employer. Counsel for the employer shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by the administrative law judge.

Paul A. Mapes
Administrative Law Judge

Date_____